

CLEAN WATER ACT (CWA) SECTION 404 ASSUMPTION RULEMAKING AND ACTIVITIES

BACKGROUND:

- Michigan and New Jersey are currently the only states that administer the Section 404 program. States and tribes have cited various reasons for not assuming the CWA Section 404 program including lack of dedicated federal funding, inconsistency between state and federal authorities, lack of partial assumption authority, and lack of clarity on which waters of the U.S. the Army Corps of Engineers (Corps) retains.
- In 2018, the EPA announced it would clarify the regulations addressing the requirements and process for states and tribes to assume the CWA Section 404 dredged and fill permitting program.
 - From 2015-2017, an EPA Federal Advisory Committee Act (FACA) subcommittee provided the Administrator with recommendations on how the EPA could clarify which waters states and tribes may assume under CWA Section 404(g) for purposes of issuing dredged or fill permits.
 - In July 2018, the Assistant Secretary of the Army for Civil Works issued a memorandum to the Corps clarifying which waters states and tribes may assume.
 - Between October 2018 and January 2019, the EPA held early input sessions with states and consulted with tribes on what should be clarified in the regulatory revision.

KEY POINTS:

- Congress gave states and tribes the authority to assume the CWA Section 404 dredged and fill permitting program for certain waters within their state/tribal boundaries. Under Section 404(g), the EPA approves state and tribal requests to assume the program.
- The EPA has worked with multiple states and tribes who considered assumption, but for various reasons chose not to pursue the program. EPA is actively working with Florida, Minnesota, Nebraska, Oregon, and others who have expressed interest in assuming the program.
- How state programs and permits are treated under the Endangered Species Act (ESA) has been an obstacle to states and tribes assuming the 404 program. The EPA is working with Florida and other states on addressing ESA considerations in program assumption and the Agency has identified Florida as a designated federal representative to work with the Departments of Interior and Commerce on initial consultation issues.
- In response to input from states and tribes, the Agency initiated a rulemaking to revise our 1988 regulations to clarify and modernize the regulations. In 2018, EPA conducted tribal consultation as well as pre-proposal input meetings and webinars with states and tribes. States and tribes then provided pre-proposal recommendations to EPA in early 2019.
- The EPA is currently developing options for the rulemaking.

TALKING POINTS:

- EPA is taking action to better balance the responsibilities for protecting our environment between the federal government and states.
- EPA has initiated a rulemaking to modernize our existing assumption regulations to reduce barriers for states and tribes to assume the Section 404 permitting program and expects to issue a proposal in 2020.
- By empowering states and tribes to take on this permitting responsibility, we can achieve greater efficiencies in infrastructure and other permitting decisions while continuing to protect the environment.